

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ELY

In the Matter of the Licenses
FACT,
of Gary Flesner, d/b/a
AND
Gary's North Orleans
RECOMMENDATION

FINDINGS OF
CONCLUSIONS,

The above-entitled matter came on for hearing before Barbara L. Neilson, Administrative Law Judge, on February 11, 1993, at 10:00 a.m. in the City Council Chambers of the Ely City Hall, 209 East Chapman Street, Ely, Minnesota. William F. Defenbaugh, Jr., and Mark C. Weir, Attorneys at Law, Defenbaugh, Phillips & Weir, 11 East Sheridan Street, Ely, Minnesota 55731, appeared on behalf of the City of Ely ("the City"). Philip S. Eckman, Attorney at Law, Clure, Eaton, & Butler, Suite 1400, Alworth Building, 306 West Superior Street, Duluth, Minnesota 55802-1894, appeared on behalf of the Licensee, Gary Flesner d/b/a Gary's North Orleans. The record closed on March 5, 1993, when the Licensee's post-hearing brief was received.

This Report is a recommendation, not a final decision. The City Council of the City of Ely will make the final decision after a review of the record. The City Council may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat.

14.61, the final decision of the City Council shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the City Council. Parties should contact William E. Defenbaugh, Jr., to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this proceeding is whether the Licensee permitted the consumption or display of liquor upon its premises after hours or failed to hold its premises open to inspection and examination by the police on October

11, 1992, contrary to St. Paul Legislative Code 310.12 and 409.07(c),
and,
if so, whether adverse action should be taken by the City with respect to
any
of the licenses held by the Licensee.

Based upon all of the proceedings herein, the Administrative Law Judge
makes the following:

FINDINGS OF FACT

1. Gary Flesner operates a food and liquor establishment in the City
of
Ely known as Gary's North Orleans. In 1989, Mr. Flesner was unsuccessful in
obtaining an unrestricted intoxicating liquor license from the City. The
City
subsequently granted him a strong beer and wine license.

2. In late 1990 and early 1991, Mr. Flesner sought a restricted on-sale liquor license from the City. During his discussions with the Mayor, Mr. Flesner indicated that he wanted to operate a first class restaurant where patrons would be able to have a cocktail with their meal, not just another "watering hole." In a meeting held on February 21, 1991, the Ely City Council voted to place two inactive liquor licenses in actively available status. One was to be for a "hotel/motel restaurant, resort or convention center" and the other for "a restricted status for restaurant purposes with no bar service, but only waitress served type service, and such other restrictions as the Ely City Council deems reasonable." (City Ex. 14.) The City Council then approved the granting of a restricted liquor license to Mr. Flesner. (Id.) The minutes of the Council meeting set forth the restrictions to be placed on the license as follows:

1. There will be no standing up or sit down bar in the building.
2. All drinks will be served by a waitress or waiter.
3. Dinner dances will be held for individuals over 21 years of age.
4. An 11:00 p.m. lockout will be in effect throughout the entire year. Clientele will not have to leave the establishment after the lockout until the closing time of 1:00 a.m.

(City Ex. 14; Jt. Ex. 2.) The minutes of the Council meeting specified that "any violation of listed conditions will result in a revocation of said license." (City Ex. 14.)

3. The conditions imposed upon Mr. Flesner's liquor license apparently were derived from a list of conditions initially proposed to the Council by Mr. Flesner. (City Ex. 13.) The City did not include among these conditions an additional restriction previously proposed by Mr. Flesner that would have provided that "[d]rinks will absolutely not be served in the area of a youth dance." (City Ex. 12.)

4. Shortly thereafter, Mr. Flesner also was granted a similar Sunday on-sale liquor license with the same restrictions.

5. On August 14, 1991, Mr. Flesner's on-sale and Sunday on-sale liquor licenses were renewed for the period of September 1, 1991, to August 31, 1992. The same restrictions remained applicable. The addendum setting forth the restrictions continued to provide that "[a]ny violation of above listed conditions will result in a revocation of said licenses." (Jt. Ex. 1 and 2.)

6. On March 26, 1992, John Manning, then Assistant Chief of the Ely Police Department and currently the Chief of Police, went to Gary's North Orleans at the request of then-Chief Jiacik to determine whether there was a stand-up bar on the premises in violation of the conditional license. the premises were in the process of being remodeled at the time of Chief Manning's

visit. Chief Manning took several photographs during his visit. (City Exs.

4-11.) City Ex. 10 depicts the counter that had been used prior to the remodeling; City Ex. 9 depicts the new counter. In a memorandum submitted following his visit, Chief Manning noted that "[t]he new counter is move like a restaurant type counter" and that "[t]he old counter was still there, but

acted more like a barrier as he has an electric dart machine behind it." (Respondent Ex. 1.) Chief Manning further indicated that, "It appears to me that this will be a lunch counter but I also could see that if someone sat at the counter ordered a drink and was served that, in some people's mind, they could construe it to be a bar although there is no alcohol directly behind the counter." (Id.) At this time, Mr. Flesner also discussed with Chief Manning a procedure under which individuals who were under legal drinking age would wear wristbands and sign "contracts" saying that they would not drink. Mr. Flesner indicated to Chief Manning that he had been told that such "contracts" were legal and binding. Chief Manning took a copy of the "contract" and the wristband with him. Chief Manning wrote a report regarding his inspection of the premises but did not issue any citations or charges.

7. On July 9, 1992, Ely Police Officer Lawrence Reedy received a complaint from the owner of another bar in Ely that the door to Gary's North Orleans was not being locked at 11:00 p.m. in accordance with the conditional license. Officer Reedy arrived at North Orleans at approximately 12:20 a.m. and found the front door unlocked. He observed approximately six patrons in the establishment sitting at tables and on stools at the counter. There were beer bottles and what appeared to be mixed drinks sitting on the counter. Mr. Flesner was behind the counter. Officer Reedy did not recall seeing Mr. Flesner or any other employees pour any drinks behind the counter nor did he recall seeing anyone eating any food at the time. All of the patrons appeared to Officer Reedy to be of legal drinking age. (City Ex. 4.) Officer Reedy wrote a report regarding this incident but did not issue any citations or charges.

8. In August of 1992, the Ely City Council considered whether to renew various liquor licenses, including those issued to Mr. Flesner. Although it was recommended that the members of the City Council visit Gary's North Orleans, some Council members did not do so.

9. On August 18, 1992, it was reported at a meeting of the City Council that the Liquor Committee had met concerning the renewal of the restricted

license held by Mr. Flesner and did "not have a recommendation either way, for council consideration." A motion by Alderman Forsman to grant Mr. Flesner a restricted liquor license for a one-year probationary period with additional restrictions set up by the Liquor Committee and the Chief of Police failed. The City Council then voted 5-2 to "deny the renewal of the current restricted liquor license application being held by Gary Flesner, North Orleans, being that it is unenforceable." (City Ex. 15.) The non-renewal was effective September 1, 1992,

10. Following the non-renewal of his liquor licenses, Mr. Flesner's business decreased. Mr. Flesner closed his establishment and sold some of his kitchen equipment in order to cover his costs.

11. On October 26, 1992, the Ely City Council met in closed session and then held a special meeting to discuss Mr. Flesner's proposal to settle his claim regarding his liquor license. The Council voted 3-2 that, "although there may have been a possible gap in the hearing process, the council feels they have met due process, there will be no cash settlement given Gary Flesner, restricted liquor license will be renewed at this time although the council feels that the given restrictions had not been complied with, and that

a hearing be set up with an independent examiner, to be scheduled as soon as possible." (City Ex. 16.) Lee Tessier, the Clerk-Treasurer for the City, delivered a letter to Mr. Flesner on October 29, 1992. The letter reiterated that the City had made an offer to settle the matter on the terms set forth in the motion and stated that Mr. Flesner may wish to make a counter offer or reject the offer. The Clerk-Treasurer further indicated that Mr. Flesner was entitled to a hearing and asked that Mr. Flesner notify the City in writing within the next ten days whether he wished to have a hearing before an independent hearing examiner to "address the sufficiency of the council's decision not to renew on the basis of your failure to comply with the restrictions on your license and the unenforceability of the restriction." (City Ex. 17.)

12. In a letter dated November 5, 1992, the Ely City Clerk "reiterated the last settlement offer from the Council that your license would be renewed until a hearing could be held" and noted that the City interpreted the fact that Mr. Flesner had paid the license fee and was selling alcohol as an acceptance of the offer. Mr. Flesner was asked to contact the City to set up a time for the hearing. (City Ex. 18.)

13. On December 5, 1992, at approximately 12:05 a.m., Officer Reedy saw a woman who appeared to be intoxicated outside Gary's North Orleans. The woman went inside Gary's North Orleans when Officer Reedy approached, and Officer Reedy went inside to check on her. There was a dance in Gary's North Orleans that evening. Officer Reedy observed people drinking and sitting at the bar. A waitress was present. Someone placed an order for some food while Officer Reedy was there. He also saw several people who appeared to be under legal age dancing or standing inside the establishment. He did not ask any of the patrons to produce identification. When he asked Mr. Flesner if everyone was of legal drinking age, Mr. Flesner indicated that everyone was of legal age except three or four individuals. Mr. Flesner further stated that the underage individuals were wearing ID bracelets and were not served any alcoholic beverages. When Officer Reedy asked Mr. Flesner if that was in violation of his restricted license, Mr. Flesner told him that the restrictions were illegal and no longer applied to him. (City Ex. 2.) Officer Reedy wrote a report regarding this incident but did not issue any citations or charges.

14. On January 2, 1993, Officer Reedy received an anonymous complaint that there were several under-age persons in Gary's North Orleans. A dance was being held at Gary's that evening. When Officer Reedy walked into the establishment at approximately 10:50 p.m., he observed "several under aged persons in the establishment, some dancing, some standing, some sitting." Officer Reedy did not see any food in the establishment. Bob Forsman, an

employee who was checking the door, told Officer Reedy that all of the patrons were of legal drinking age except three. Mr. Forsman showed Officer Reedy several signed cards which had licenses stapled to them and told him that the under-aged patrons had had their licenses taken at the door and were wearing identification bracelets. Mr. Forsman and Mr. Flesner stated that this procedure had been approved by Chief Manning. (City Ex. 3.) Officer Reedy did not ask any of the patrons to produce identification. He wrote a report regarding this incident but did not issue any citations or charges.

15. Prior to time the business closed in the fall of 1992, the menu at Gary's North Orleans included steaks, shrimp, tacos, poor boys, french fries,

onion rings, pizza, and occasionally prime rib or ribeye specials. The menu offerings following the reopening of the business have been more limited. The establishment continues to offer pizza, french fries, sandwiches, and hamburgers when the grill is functional.

16. Mr. Flesner has never received any formal citations with respect to his liquor licenses.

17. On January 21, 1993, the Ely City Clerk issued a Notice to Mr. Flesner indicating that the City Council "has, on report from the Liquor Commission and related police reports, indicated that you are in continued violation of the restricted liquor license" and "has passed a motion revoking your license subject to your rights for a hearing." The Notice informed Mr. Flesner of the date of the hearing (which was subsequently continued for ten days) and informed Mr. Flesner of various rights and opportunities available through the hearing process. The Notice stated the following grounds for the "revocation" of the license:

- instead (a) your failure to operate a regular supper club with a full service menu serving liquor as an accompaniment to meals and operating a full service bar with a very minimal menu accompanying the sales of alcohol in violation of the restrictions placed upon the license;
- be (b) allowing minors and persons under the age of 21 years at the dances in violation of restriction number 3 providing dances will held for individuals over 21 years of age;
- in (c) not having all drinks served at the tables by waiters or waitresses and allowing a stand-up bar for the service of alcohol the establishment, in violation of restrictions number 1 and 2.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The City Council and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 14.55 and Chapter 5, Section 5.02, subd. 4.F. of the Ely City Code.
2. The City has the burden of proving by a preponderance of the evidence the alleged violations of license restriction, ordinance, or statute.
3. The City failed to prove by a preponderance of the evidence that the restrictions placed on Mr. Flesner's liquor licenses were violated. Adverse action thus is not appropriate in this case.

Based upon the foregoing Conclusions, and for the reasons set forth in

the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Ely City Council dismiss these proceedings against Gary Flesner d/b/a Gary's North Orleans and that no adverse action be taken against his liquor licenses.

Dated this day of April, 1993.

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

It is respectfully requested that the Ely City Council serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded; not transcribed.

MEMORANDUM

The City alleges that Gary Flesner has violated several of the conditions placed on his liquor licenses and that revocation I/ of the licenses is thus warranted. I/ The City does not seek to enforce the fourth condition placed on the license (the requirement that Mr. Flesner impose an 11:00 p.m. "lock-out") in light of requirements that liquor establishments be open to inspection during their hours of operation. The City does, however, allege that each of the other three conditions have been violated. The City further argues that the premise upon which the restricted license was granted--i.e., that Mr. Flesner would operate a restaurant/supper club rather than a bar--has been circumvented. Mr. Flesner argues in response that the license issued to him in October 1992 was in fact an unrestricted liquor license given the Council's determination in August 1992 that the restrictions were "unenforceable." In the alternative, Mr. Flesner contends that he has not violated any of the three specified restrictions at issue in this case and

I/ As noted in the Findings above, the adverse action proposed with respect to Mr. Flesner's licenses has been referred to as a "non-renewal" at times and as a "revocation" at other times. Because Mr. Flesner's licenses were in fact renewed in October 1992 pending the outcome of this hearing as part of a settlement agreement between the parties, it is appropriate to view the action proposed by the City as revocation of the licenses. Such a view is also in accordance with the wording of the formal Notice of this hearing issued by the City in January.

that it is not proper to require him to comply with the desires and expectations of individual members of the Council. 21

It is well settled that municipal bodies have broad discretion to determine the manner in which liquor licenses shall be issued, regulated, and revoked. See, e.g., *Sabes v. City of Minneapolis*, 120 N.W.2d 871, 875 (Minn. 1963). While courts reviewing such municipal proceedings will not "pass on the wisdom of the revocation," they must determine whether the City Council "exercised an honest and reasonable discretion, or whether it acted capriciously, arbitrarily, or oppressively." *Id.*; see also *Tamarac Inn, Inc. v. City of Long Lake*, 310 N.W.2d 474, 477 (Minn. 1981); *Wajda v. City of Minneapolis*, 310 Minn. 339, 343, 246 N.W. 2d 455, 457 (1976).

As a threshold matter, it is appropriate to find that the license as renewed in October 1992 remained a restricted license with the same conditions as imposed previously. While some confusion on the part of the Licensee regarding the exact nature of the restrictions to which he would be held is understandable given the Council's declaration in August 1992 that the restricted license was not being renewed "being that it was unenforceable," the fact remains that the license which was initially made available to the Licensee was characterized as a "license for a restricted status for restaurant purposes"; the Council moved on October 26, 1992, to renew the "restricted liquor license"; and the license issued to Mr. Flesner was headed "Restricted On-Sale Liquor License." There thus is no reasonable basis upon which the Licensee could conclude that all of the conditions were invalid and that the license as renewed was to be unrestricted in scope.

In order to provide adequate support for the proposed revocation, the City is required to prove that the alleged violations occurred by a

21 Mr. Flesner argued during the hearing that the City has not properly complied with Chapter 5, section 5.02, subd. 4.F. of the Ely City Code in this matter. That provision requires the City Council to suspend or revoke licenses for the sale of alcoholic beverages for violation of any City Code provision or state or federal law regulating the sale of alcoholic beverages or controlled substances in accordance with a disciplinary schedule set forth in the Code. The schedule prescribes penalties which range from a 3-day suspension for the first violation to revocation for the fourth violation within five years. In response, the City emphasized that the licenses issued to Mr. Flesner specifically provided that any violation of the conditions will result in license revocation and contended that it has the discretion to immediately revoke Mr. Flesner's license for violation of the stated restrictions under Chapter 5, Section 5.07 of the City Code. That provision states that, "[n]otwithstanding any provision of law to the contrary, the

Council may, upon a finding of the necessity therefor, place such special conditions and restrictions, in addition to those stated in this Chapter, upon any license as it, in its discretion, may deem reasonable and justified." Given the conclusion of the Administrative Law Judge that the City has not shown that Mr. Flesner violated the restrictions placed upon his licenses, it is unnecessary for the Judge to reach the issue of whether the Council in fact would have had authority to revoke Mr. Flesner's licenses without complying with the disciplinary schedule had a violation of the restrictions been established.

preponderance of the evidence. See Minn. Rules pt. 1400.7300, subp. 5 (1991); G. Beck, L. Bakken, & T. Muck, Minnesota Administrative Procedure 9.3.2 (1987). This is a much easier standard to meet than the "beyond a reasonable doubt" standard applied in criminal matters. The Administrative Law Judge is, however, unable to conclude that the City has met its burden in this case.

The evidence contained in the record simply does not support the Council's determination that Mr. Flesner has violated the restrictions placed on his license. The first restriction requires that there be no "standing up or sit down bar" in the establishment. The term "bar" was not defined by the City Council and is somewhat vague. The plain meaning of the term, however, generally incorporates the notion that liquor be kept and served from behind the structure. Thus, a "bar" is defined in New Webster's Dictionary and Thesaurus of the English Language at 77 (1991) in relevant part as "a counter over which liquor and food may be served; the space behind this counter; the room containing it." Moreover, "bar" is defined in 48 C.J.S. Intoxicating Liquors 17 at 294 as "[a] barrier or counter from which liquors and food are passed to customers, hence the portion of the room behind the counter where the liquors for sale are kept; an inclosed place of a tavern, inn, or coffeehouse, where the landlord or his servants deliver out liquors and wait upon customers; a room or counter where liquors or refreshments are dispensed, as in a public house."

Current Chief of Police John Manning determined during his inspection of Gary's North Orleans in March 1992 that a new counter was being built which was "more like a restaurant type counter" and that "[t]he old counter was still there, but acted more like a barrier" for an electric dart game situated behind it. Chief Manning also emphasized that there was no alcohol directly behind the counter. Mr. Flesner confirmed that he uses an area which is separate from the lunch counter for the preparation of drinks, in accordance with rules requiring that containers from which alcoholic beverages are sold or dispensed be clearly visible to the consuming public. Minn. Rules pt. 7515.0560, subp. 6 (1991). Under these circumstances, it does not appear that the counter in the establishment should be viewed as a "bar" merely because patrons may sit at the counter while consuming alcohol. If the City Council had desired to prohibit a lunch counter, it could have specified as a condition of granting the license that drinks be served only to patrons seated at tables. It did not choose to do so.

The second restriction requires that all drinks be served by a waitress or waiter. This restriction presumably was intended to prohibit service by a "bartender." Because the City has not established that the counter present inside the establishment was in fact a "bar," the Judge is unable to conclude that Mr. Flesner, his mother, or his occasional part-time employees are cast in the role of "bartender" when they prepare drinks in the separate drink preparation area and serve them to patrons.

The third restriction requires that "dinner dances" be held for individuals over 21 years of age. Again, this term was not defined by the Council. Mr. Flesner originally proposed this restriction for Council consideration. He testified that he intended to encompass within this restriction wedding receptions and other rent-out party situations. There was no evidence at the hearing that Mr. Flesner's establishment has ever been used

for such a function. The City contends that the presence of individuals whom the police officer believed to be under 21 on two occasions at dances which occurred at approximately 11:00 p.m. and midnight establishes a violation of this condition. A dance which is held that late in the evening cannot properly be construed as a "dinner dance," at least in the absence of any evidence that the function began earlier and that dinner was also provided. Moreover, because the police officer did not check the identification of the allegedly underaged patrons, substantiation of this allegation is lacking. Further, the Council did not choose to impose a restriction on Mr. Flesner's license stating that "[d]rinks will absolutely not be served in the area of a youth dance" despite Mr. Flesner's proposal that such a condition be adopted. The types of dances which were underway at the time of the police inspections relied upon by the City were in the nature of "youth dances" rather than "dinner dances." The City thus has not shown by a preponderance of the evidence that the "dinner dance" restriction was violated.

Finally, the City contends that revocation of the license is proper because there is a limited menu at Gary's North Orleans and a "bar-type" atmosphere which includes cocktail and beer signs in the windows and inside the establishment. The City points out that Mr. Flesner represented at the time that he obtained the liquor license that he wished to create a first-class restaurant or supper club and contends that Mr. Flesner has not kept his end of the bargain. The evidence introduced at the hearing, however, does not provide an adequate basis to compel a conclusion that Mr. Flesner is operating a bar rather than a restaurant. Mr. Flesner testified that lots of people who do not drink come to his establishment. While he had to sell some of his kitchen equipment when his business closed last fall to cover costs and thus cannot currently prepare all of the food items he used to offer, he has had food available at his business every day he has been open. While the menu offered at his establishment is not extensive, sufficient items are offered to support Mr. Flesner's contention that he is operating a restaurant.

Under these circumstances, the City has not borne its burden of establishing that Mr. Flesner violated the restrictions placed on his liquor licenses. It is apparent that the nature of the business has not met the expectations of some members of the City Council. It is also evident that Mr. Flesner may not have been adequately apprised of those expectations. Should the recommendation of the Administrative Law Judge regarding this matter be accepted by the Council, the Judge urges the parties to negotiate more objective standards for operation under the restricted license ^{3/} which would provide both parties with an fair opportunity to evaluate compliance.

B.L.N.

3/ The City could, for example, require that Mr. Flesner derive the majority of his profits from food sales rather than liquor sales.

